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No. 90-149

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In The  
**Supreme Court of the United States**  
October Term, 1990

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THE PEOPLE OF THE STATE OF MICHIGAN,  
*Petitioner,*

v.

NOLAN K. LUCAS,  
*Respondent.*

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On Writ Of Certiorari  
To The Michigan Court Of Appeals

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BRIEF AMICUS CURIAE  
SUPPORTING RESPONDENT

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Curiae*

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## INTEREST OF AMICUS CURIAE<sup>1</sup>

Criminal Defense Attorneys for Michigan (CDAM) is a statewide, nonprofit organization with several hundred members including all public defenders in the State of Michigan as well as contract defenders and private attorneys. Since its inception in 1976, CDAM has been active in providing continuing legal education for criminal defense lawyers, and in serving as *amicus curiae* in cases of significance to the criminal jurisprudence of the State of Michigan.

Amicus Curiae files this brief to urge this Court to decline to rule on the Constitutionality of the Michigan Rape Shield Statute as that question was not necessary to the ruling of the Michigan Court. Rather, the Michigan Court of Appeals ruled the state trial court's exercise of the discretion authorized by the statute was wrong and denied Mr. Lucas his constitutional right of confrontation.

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## STATEMENT OF THE CASE

Amicus accepts the statement of the case presented by Mr. Lucas. -

Amicus adds at the preliminary examination that defense counsel cross examined the complainant about her prior sexual relations with Mr. Lucas (Pr. Tr. 23). In addition, Mr. Lucas also testified on the same point at the preliminary examination (Pr. Tr. 62).

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<sup>1</sup> Letters of consent to the filing of this brief have been lodged with the clerk pursuant to Rule 37.3.

### SUMMARY OF ARGUMENT

The State of Michigan Rape Shield Law with its notice provision has not been held unconstitutional in Mr. Lucas' case. Rather, the Michigan Court of Appeals held that the imposition of the maximum sanction of preclusion of cross examination in this fact situation denied Mr. Lucas his constitutional right of confrontation.

The Michigan Court of Appeals may have been careless in its analysis, but it is implicit in its two rulings that it did consider the "issue whether the trial court properly exercised its discretion in limiting respondent's proposed cross examination in this case." (Brief of *Amicus Curiae* United States, P. 9).

Therefore, this Court should affirm the ruling of Michigan Court of Appeals.

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### ARGUMENT

The decisions of the Michigan Court of Appeals did not need to rule on the constitutionality of the Rape Shield Law nor its notice provision. Rather, the rulings were a review of the trial judge's failure to exercise discretion in disallowing cross examination of the complainant. The Michigan Court found if the trial court had exercised its discretion, it would have had to allow cross examination. Thus, the case is similar to this Court's decision in *Davis v Alaska*, 415 US 308 (1974).

In *Davis*, a state trial court prohibited cross examination of a prosecution witness based on an Alaska statute that said a juvenile court disposition was not admissible

in a subsequent trial. The State of Alaska's legislature had determined that as a matter of public policy juvenile proceedings were confidential. This policy was to protect the juvenile from embarrassment in subsequent adult court proceedings.

In *Davis*, the accused attempted to cross examine the state's witness with his prior juvenile record to show that he was biased, because he was on probation. The trial court ruled the statute prevented the use of the record for cross examination. This Court held the application of the state statute to the facts resulted in *Davis* being denied his constitutional right to confrontation.

"The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination." *Id* at 315-6. (Emphasis in original).<sup>2</sup>

It is important to note that it was not necessary to the *Davis* decision to rule on the constitutionality of the Alaska statute. Likewise, in this case, the constitutionality of the Michigan Rape Shield Law and its notice provision is not in question. Rather, the Michigan decision was based upon the application of the preclusion sanction to the facts of this case.

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<sup>2</sup> Justice White joined by Chief Justice Rehnquist dissented on the basis that there was no constitutional principle at stake, but rather a state court exercising its discretion in limiting cross-examination. *Id* at 321. They would give great respect to the state court's decision. That analysis would also result in this Court ruling to affirm the Michigan Court of Appeals decision.

Certainly, if the concern of the legislature were to protect the complainant, that concern was overcome when the complainant was cross examined about her prior sexual relationship with Mr. Lucas at the preliminary examination (Pr. Tr. 23).

In addition, the statute cannot claim surprise, because the cross examination at the preliminary examination provided actual notice prior to the running of the ten days that the defense was based in part on the prior sexual relationship between the complainant and Mr. Lucas. Further, the trial court could have granted an adjournment if the prosecutor needed more time to prepare.

Thus, it is clear what the Michigan Court of Appeals decided was that the trial court's limitation on cross examination in this fact situation was a constitutional error, which was not harmless.

It should be noted Amicus does not address the question of whether a state may enact a statute requiring notice of intent to cross examine an alleged rape victim, nor whether the notice provision in the Michigan statute is constitutional, nor whether preclusion of cross examination on that point may be used as a sanction for failure to comply with the notice provision. Rather, Amicus submits in this case the Michigan Court has concluded that where the prosecution had actual notice of the cross examination and the trial court invoked preclusion without exercising its discretion, Mr. Lucas was denied his constitutional right of cross examination.

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## CONCLUSION

The judgment of the Michigan Court of Appeals should be affirmed.

Respectfully submitted,

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DATED: February 4, 1991